

NOV 27 2006

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, DC 20463

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR: 5678

DATE COMPLAINT FILED: August 18, 2005

DATE OF NOTIFICATION: August 24, 2005

LAST RESPONSE RECEIVED: October 4, 2005

DATE ACTIVATED: August 21, 2006

EXPIRATION OF S.O.L: November 15, 2009

COMPLAINANT:

Renee Pfenning

RESPONDENTS:

Michael Liffri

Liffri for Senate and Michael Liffri, in his official
capacity as treasurer

Harold Newman

Newman Signs, Inc.

Bully PAC and Nancy Schafer, in her official
capacity as treasurer

RELEVANT STATUTES:

2 U.S.C. § 434(b)

2 U.S.C. § 441a(a)

2 U.S.C. § 441b

2 U.S.C. § 441f

11 C.F.R. § 103.3(b)

11 C.F.R. § 110.1(h)

11 C.F.R. § 110.6(b)

INTERNAL REPORTS CHECKED:

Federal Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint filed by Renee Pfenning in this matter alleges multiple violations of the Federal Election Campaign Act of 1971, as amended (the "Act") by Liffrig for Senate, the principal campaign committee for Michael Liffrig's 2004 bid for U.S. Senator for North Dakota; Mr. Liffrig; Newman Signs, Inc.; Harold Newman; and Bully PAC. The complainant alleges that: (1) Newman Signs, Inc. made, and Liffrig for Senate knowingly accepted, an improper in-kind corporate contribution consisting of discounted billboard advertising space and production costs; (2) Harold Newman made an excessive contribution or a contribution in the name of another to Liffrig for Senate by making an earmarked contribution to Bully PAC; (3) Bully PAC made, and Liffrig for Senate knowingly accepted, an excessive contribution or contribution in the name of another by Harold Newman; and (4) Liffrig for Senate violated the Act by failing to disclose certain debts and obligations.

As more fully set forth below, based on the complaint, the responses, and other available information, we recommend the Commission find reason to believe that Bully PAC and Nancy Schafer, in her official capacity as treasurer, violated 2 U.S.C. § 441a(a) by making an excessive in-kind contribution to Liffrig for Senate and that Liffrig for Senate and Michael Liffrig, in his official capacity as treasurer, violated 2 U.S.C. § 441a(f) and 11 C.F.R. § 103.3(b) by knowingly receiving and failing to refund the excessive contribution. However, available information indicates that there is no reason to believe any of the respondents violated 2 U.S.C. §§ 441a(a), 441a(f), 441b, or 441f by making or receiving earmarked contributions, corporate contributions, or contributions in the name of another. In addition, we recommend the Commission find reason to believe that Liffrig for Senate and Michael Liffrig, in his official capacity as treasurer, violated 2 U.S.C. § 434(b) by failing to file reports disclosing contributions from political committees and outstanding debts and obligations. However, given the facts and circumstances

27044154927

of this matter, we recommend admonishing Liffriq for Senate and Michael Liffriq, in his official capacity as treasurer, as to these violations and taking no further action.

II. THE BILLBOARDS

A. Factual Summary

In 2004, Michael Liffriq ran unsuccessfully to unseat Sen. Byron Dorgan as U.S. Senator from North Dakota. Liffriq for Senate was his authorized committee. During the campaign, Newman Signs, Inc. charged Liffriq for Senate \$26,616 for billboard advertising space. Newman Signs is wholly owned by Harold Newman, an experienced political contributor who has supported both Democratic and Republican candidates. The complaint alleges that, based on the significantly higher amount paid by Friends of Byron Dorgan for billboard advertising space, Newman Signs made an improper in-kind corporate contribution to Liffriq for Senate. *See* Complaint, at 2-3.

In a joint response, Mr. Liffriq and Liffriq for Senate deny receiving corporate or excessive contributions. According to Mr. Liffriq, he agreed to pay the "published rate" for the billboard space he rented from Newman Signs. *See* Affidavit of Michael Liffriq (attached to Joint Response of Michael Liffriq and Liffriq for Senate ("Joint Response")), at 1. Harold Newman and Newman Signs also deny violating the Act and provided a detailed summary explaining the basis of the billboard rental fees charged to Mr. Liffriq. According to Newman Signs, Liffriq for Senate paid the standard rate of \$444 per sign per month for displaying paper posters measuring approximately ten feet by twenty-two feet, and did not receive any production services. *See* Joint Response of Harold Newman and Newman Signs, Inc. ("Newman Response"), at 2. In contrast, Newman Signs charged Friends of Byron Dorgan the standard rate of \$1,250 per sign per month for vinyl billboards measuring fourteen feet by forty-eight feet. *See*

1 *id.* The fee charged to Friends of Byron Dorgan included Newman Signs' production costs for
2 making the billboard. *See id.*

3 **B. Legal Analysis**

4 Corporations are prohibited from making contributions or expenditures from their general
5 treasury funds in connection with any election of any candidate for federal office. 2 U.S.C.
6 § 441b(a). In addition, a candidate may not knowingly receive a corporate contribution. *See id.*
7 A contribution is defined as a gift, subscription, loan, advance, or deposit of money or anything
8 of value made for the purpose of influencing any election for federal office. *See* 11 C.F.R.
9 § 100.52(a). The definition of contribution also includes goods and services provided at less
10 than the normal and usual charge. *See* 11 C.F.R. § 100.52(d)(1).

11 Although there is a large discrepancy in the amount charged by Newman Signs, Inc. to
12 Liffbrig for Senate and his opponent, Sen. Byron Dorgan, for billboard advertisements, it does not
13 appear that Newman Signs provided goods or services to Liffbrig for Senate at a discount. The
14 different rates can be explained by the larger signs, higher quality material, and the inclusion of
15 production services provided by Newman Signs to Friends of Byron Dorgan. *See* Newman
16 Response, at 2. We therefore recommend the Commission find no reason to believe that
17 Newman Signs, Inc. or Liffbrig for Senate violated 2 U.S.C. § 441b(a) by making or knowingly
18 accepting a corporate in-kind contribution.

19

27044154929

III. ALLEGEDLY EARMARKED CONTRIBUTION

A. Factual Summary

According to Mr. Liffrig, at some point around the time of the 2004 general election, Mr. Liffrig's father, a campaign volunteer, talked to Harold Newman about supporting Liffrig for Senate. *See* Affidavit of Michael Liffrig (attached to Joint Response), at 1. Although we do not know the specific details of the conversation, Mr. Liffrig's affidavit suggests that when Mr. Liffrig's father talked with Mr. Newman, he may have asked Mr. Newman to contribute directly to Liffrig for Senate and also suggested he contribute to another political committee, Bully PAC, which could lend its support to the campaign. *See id.* On November 5, 2004, or three days after the election, Mr. Newman contributed \$2,000 to Liffrig for Senate. On November 16, 2004, Mr. Newman contributed \$5,000 to Bully PAC, a thinly funded, non-connected committee associated with former North Dakota Governor Ed Shafer that did not qualify for multicandidate status. At the time, Bully PAC had less than \$500 in cash on hand.¹ A month later, on December 15, 2004, Bully PAC made an in-kind contribution to Liffrig for Senate by giving \$6,000 to Newman Signs in partial payment of the outstanding balance owed for billboard rentals.² This was the only contribution made by Bully PAC during the 2004 election cycle. The complaint alleges that the \$6,000 contribution exceeds the Act's contribution limits and constitutes a contribution in the name of another because Mr. Newman earmarked the contribution to assist Liffrig for Senate. *See* Complaint, at 3-4.

According to Mr. Liffrig, although his father suggested that Harold Newman contribute to Bully PAC, there was no agreement or expectation that Bully PAC would use any portion of

¹ On November 24, 2004, John Hoeven, the Governor of North Dakota, and his wife, Mikey, each contributed \$2,000 to Bully PAC, boosting its cash on hand to approximately \$10,000.

² At this time, Liffrig for Senate owed Newman Signs approximately \$13,000 for billboard rentals.

27044154930

1 the contribution for the benefit of Liffriq for Senate. *See* Affidavit of Michael Liffriq (attached
2 to Joint Response), at 1. Mr. Liffriq further stated that he was unaware of any limitations placed
3 on how Bully PAC could use Mr. Newman's contribution. *See id.*, at 2. In his unsworn
4 response, Mr. Newman claims he did not place any restrictions on his contribution to Bully PAC
5 and that he was not involved in Bully PAC's decision to contribute to Liffriq for Senate. *See*
6 Newman Response, at 2-3. Bully PAC's response echoes the other respondents' denials that Mr.
7 Newman exerted any control over how Bully PAC could spend the contribution. *See* Response
8 of Bully PAC, at 2.

9 **B. Legal Analysis**

10 Because Mr. Newman had already contributed the maximum allowable contribution of
11 \$2,000 to Liffriq for Senate, his contribution to Bully PAC would have been excessive if it either
12 contained "a designation, instruction, or encumbrance" that caused Bully PAC to make the
13 \$6,000 in-kind contribution to Liffriq for Senate or if Mr. Newman made the contribution with
14 the knowledge that a substantial portion will be contributed to a specific candidate and Mr.
15 Newman retained control over the funds.

16 The Act states that no person shall make a contribution in the name of another person or
17 knowingly permit his name to be used to effect such a contribution. 2 U.S.C. § 441f. The Act
18 also provides that "all contributions made by a person, either directly or indirectly, on behalf of a
19 particular candidate including contributions which are in any way earmarked or otherwise
20 directed through an intermediary or conduit to such candidate, shall be treated as contributions
21 from such person to such candidate." 2 U.S.C. § 441a(a)(8). The intermediary receiving these
22 contributions must report the identity of the contributor and the intended recipient of each such
23 contribution to both the Commission and to the intended recipient. *Id.* The Commission's
24 accompanying regulation states that an "earmarked" contribution is one that contains "a

27044154931

1 designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or
2 written, which results in all or any part of a contribution being made to, or expended on behalf of
3 a clearly identified candidate." 11 C.F.R. § 110.6(b)(1).

4 In addition to the statute and regulations regarding earmarking, 11 C.F.R. § 110.1(h)
5 provides that a person may contribute the maximum allowable to a candidate or his or her
6 authorized committee with respect to a particular election and separately contribute the
7 maximum allowable to a political committee which has supported, or anticipates supporting, the
8 same candidate in the same election, as long as: (1) the political committee is not the candidate's
9 principal campaign committee or other authorized political committee or a single candidate
10 committee; (2) the contributor does not give with the knowledge that a substantial portion will be
11 contributed to, or expended on behalf of, that candidate for the same election; and (3) the
12 contributor does not retain control over the funds. If the contributor has the requisite knowledge
13 or retains control of the funds, the contributions count against the contributor's contribution
14 limits under section 441a(a) of the Act, and any contribution over the limit is treated as
15 excessive. *See* MUR 4568 (Triad Management Services).

16 In this matter, Mr. Newman's response clearly states that he did not direct or instruct
17 Bully PAC to make a contribution to Liffrog for Senate. *See* Newman Response, at 2-3. This is
18 consistent with Bully PAC's response, which states that it did not think that the contribution
19 from Mr. Newman was earmarked and that it made the decision to contribute to Liffrog for
20 Senate based on its desire to assist Liffrog for Senate in reducing its outstanding debts. *See* Bully
21 PAC Response, at 2. In addition, at this stage we do not have information such as a check
22 notation or contribution transmittal letter to suggest that Harold Newman earmarked the \$6,000
23 contribution to Bully PAC to Liffrog for Senate. *See* MURs 4831 and 5274 (Missouri
Democratic State Committee (Statement Of Reasons of Vice Chairman Smith and Commissioner

1 Toner), at 2-3 (earmarking finding should be based on a designation, instruction or encumbrance
2 by original donor). We have no information that there were any designations, instructions, or
3 encumbrances on Mr. Newman's check to Bully PAC, and both Mr. Newman and Bully PAC
4 effectively deny that Mr. Newman orally placed any restrictions on his contribution.

5 Similarly, Mr. Newman does not appear to have had the requisite knowledge or control
6 over his contribution to run afoul of 11 C.F.R. § 110.1(h), which, as discussed *supra*, prevents a
7 contributor from evading contribution limits by contributing to a political committee with
8 knowledge that the political committee will use the contribution to benefit a particular recipient
9 or while retaining control over his or her contribution. In his response, Mr. Newman stated that
10 "any decision by Bully PAC to support the Liffirg for Senate campaign was made entirely
11 independent from any instruction or decision to support the Liffirg for Senate campaign made by
12 Mr. Newman." Newman Response, at 2-3. Bully PAC's response also contends that it
13 separately decided to support Liffirg for Senate after communicating with the committee
14 regarding outstanding debts. *See* Bully PAC Response, at 2. No information has been presented
15 suggesting any communication between Mr. Newman and Bully PAC concerning the
16 contribution.

17 As described in the earmarking analysis, although Mr. Newman may have made a
18 contribution with the hope that it would at least partially benefit Liffirg for Senate, the facts in
19 this matter do not demonstrate a level of knowledge or control sufficient to support finding that
20 Mr. Newman ran afoul of 11 C.F.R. § 110.1(h). *Compare* MUR 4568 (Triad Management
21 Services) (finding excessive contributions based on corporate scheme to funnel individuals'
22 contributions through intermediary political committees to specific campaign committees), *with*
23 MUR 5445 (Quentin Nesbitt) (finding no reason to believe respondents ran afoul of 11 C.F.R.

27044154933

1 § 110.1(h) based on limited contacts, the lack of an understanding regarding how the political
2 committee would spend the contribution, and the contributor's lack of control over the funds).

3 Because Mr. Newman's contribution to Bully PAC does not appear either to have been
4 earmarked or within the scope of 11 C.F.R. § 110.1(h), we recommend the Commission find no
5 reason to believe that Harold Newman violated 2 U.S.C. § 441a(a)(1)(A) by making, or that
6 Liffrig for Senate and Michael Liffrig, in his official capacity as treasurer, or Michael Liffrig,
7 violated 2 U.S.C. § 441a(f) by receiving, an excessive contribution, and recommend the
8 Commission find no reason to believe that Bully PAC and Nancy Shafer, in her official capacity
9 as treasurer, violated 2 U.S.C. § 441a(a)(8) by failing to file a conduit report for an earmarked
10 contribution. In addition, given that Mr. Newman did not reimburse Bully PAC for its
11 contribution, we recommend the Commission find no reason to believe that neither Harold
12 Newman nor Bully PAC and Nancy Schafer, in her official capacity as treasurer, violated
13 2 U.S.C. § 441f by making, nor Liffrig for Senate and Michael Liffrig, in his official capacity as
14 treasurer, or Michael Liffrig, violated 2 U.S.C. § 441f by knowingly receiving, a contribution in
15 the name of another.

16 **IV. EXCESSIVE POLITICAL COMMITTEE CONTRIBUTION**

17 **A. Factual Summary**

18 On March 9, 2005, the Reports Analysis Division ("RAD") informed Bully PAC that its
19 \$6,000 in-kind contribution to Liffrig for Senate may have been excessive. *See* Complaint, Ex.
20 5. Bully PAC responded on April 5, 2005 by requesting that Liffrig for Senate refund the
21 excessive portion of the contribution, or \$4,000. *See* Complaint, Ex. 6. Liffrig for Senate has
22 yet to make the requested \$4,000 refund to Bully PAC.

23 In response to the complaint, Bully PAC acknowledges that it made an excessive
contribution, but claims that it sought a refund as soon as it made the discovery. *See id.*, at 1-2.

B. Legal Analysis

In 2004, political committees could contribute up to \$2,000 to a candidate committee per election. *See* 2 U.S.C. § 441a(a)(1). This limit increases to \$5,000 per candidate committee per election in the case of a qualified multicandidate committee. A multicandidate committee is a non-connected political committee that has received contributions from at least fifty-one persons, has been registered with the FEC for at least six months, and contributed to at least five federal candidates. *See* 2 U.S.C. § 441a(a)(2); 11 C.F.R. § 100.5(e)(3). At the time Bully PAC made the contribution, it did not qualify as a multicandidate committee and therefore could contribute no more than \$2,000 to Liffri for Senate. In addition, a candidate or political committee may not knowingly accept any contribution in violation of the limits set forth in section 441(a). *See* 2 U.S.C. § 441a(f).

As Bully PAC admits in its response, its \$6,000 in-kind contribution to Liffri for Senate was excessive. *See* Bully PAC Response, at 1. In response to an RFAI dated March 9, 2005, Bully PAC, on April 5, 2006, requested that Liffri for Senate refund \$4,000. Liffri for Senate has yet to make the requested refund. We therefore recommend the Commission find reason to believe that Bully PAC violated 2 U.S.C. § 441a(a)(1) by making an excessive in-kind contribution to Liffri for Senate and enter into pre-probable cause conciliation with Bully PAC. In addition, given that at some point in 2005 Mr. Liffri negotiated a payment plan with Newman Signs, and therefore must have known that Bully PAC paid a portion of Liffri for Senate's debt, we recommend the Commission find reason to believe that Liffri for Senate violated 2 U.S.C. § 441a(f) by knowingly accepting an excessive contribution. However, given that Liffri for Senate has no ability to pay a penalty (and no longer maintains a bank account) and Mr. Liffri is personally paying off the committee's remaining debts, we recommend admonishing Liffri for Senate as to this violation and taking no further action.

V. FAILURE TO REPORT IN-KIND CONTRIBUTION AND DEBTS AND OBLIGATION

To date, Liffriq for Senate has yet to file a report with the Commission disclosing the \$6,000 in-kind contribution from Bully PAC in violation of 2 U.S.C. § 434(b)(2)(D), which requires that a candidate's authorized committee file reports disclosing contributions from political committees. In addition, Liffriq for Senate did not include the debt owed to Newman Signs, Inc. on either its 2004 Pre-General, Post-General or Year End reports in violation of 2 U.S.C. § 434(b)(8), which requires authorized committees to file reports disclosing the total amount and nature of outstanding debts and obligations owed by or to the committee.³ We therefore recommend the Commission find reason to believe that Liffriq for Senate and Michael Liffriq, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b)(2)(D) and 434(b)(8). However, given that Liffriq for Senate has no ability to pay a penalty (*see supra* IV.B) (and no longer maintains a bank account), we recommend admonishing Liffriq for Senate and Michael Liffriq, in his official capacity as treasurer, as to these violations and taking no further action.

VI. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

³ Liffriq for Senate first disclosed the debt to Newman Signs, Inc. on its 2005 April Quarterly Report. Other than this report, which was not filed until September 12, 2006, Liffriq for Senate has failed to file any reports with the Commission since its 2004 Year End Report in violation of 2 U.S.C. § 434(a)(1).

VII. RECOMMENDATIONS

1. Find no reason to believe that Newman Signs, Inc. or Liffrig for Senate and Michael Liffrig, in his official capacity as treasurer, violated 2 U.S.C. § 441b(a);
2. Find no reason to believe that Harold Newman violated 2 U.S.C. §§ 441a(a)(1)(A) or 441f;
3. Find no reason to believe that Michael Liffrig or Liffrig for Senate and Michael Liffrig, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) or 441f;
4. Find no reason to believe that Bully PAC and Nancy Schafer, in her official capacity as treasurer, violated 2 U.S.C. §§ 441a(a)(8) or 441f;
5. Find reason to believe that Liffrig for Senate and Michael Liffrig, in his official capacity as treasurer, violated 2 U.S.C. § 434(b);
6. Find reason to believe that Liffrig for Senate and Michael Liffrig, in his official capacity as treasurer, violated 2 U.S.C. § 441a(f);
7. Approve the attached Factual and Legal Analysis; and

8. Approve the appropriate letters.

Lawrence H. Norton
General Counsel

Date

11/27/06

BY:

Lawrence L. Calvert, Jr.
Deputy Associate General Counsel
for Enforcement

Ann Marie Terzaken
Assistant General Counsel

Adam Schwartz
Attorney

Attachments:

1. Factual and Legal Analysis – Bully PAC